

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MACK COLVIN

Claimant

VS.

SEDGWICK COUNTY

Respondent

Self-Insured

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Docket No. 237,154

ORDER

Respondent appeals an Award entered by Administrative Law Judge Jon L. Frobish on November 12, 1999. The Appeals Board heard oral argument April 14, 2000.

APPEARANCES

James B. Zongker of Wichita, Kansas, appeared on behalf of claimant. E. L. Lee Kinch of Wichita, Kansas, appeared on behalf of respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The sole issue on appeal is the nature and extent of claimant's disability. The ALJ found claimant has a 38 percent work disability based on a 33 percent task loss and a 43 percent wage loss. On appeal, respondent argues the work disability should be lower. According to respondent, the wage loss should be 39 percent. Respondent argues claimant's post-injury wage was \$7.90 per hour and the ALJ incorrectly used \$7.40 per hour. Respondent also argues the task loss should be 3 percent based on the testimony of the treating physician, Dr. Robert L. Eyster. The ALJ used the opinions of both Dr. Eyster and Dr. Pedro A. Murati to arrive at the 33 percent task loss.

Claimant, on the other hand, argues the work disability should be 57.5 percent. Claimant argues the wage loss should be 46 percent and the task loss should be 69 percent based on the opinion of Dr. Murati.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the wage loss and task loss should both be corrected slightly but that the result should remain a 38 percent work disability and the Award affirmed.

Claimant, who worked for respondent doing grounds keeping and maintenance, was injured in an automobile accident on January 29, 1998, while bringing tools to a job site. Claimant was treated by Dr. J. E. French and Dr. Eyster. Respondent terminated claimant for negligence relating to the automobile accident, and claimant currently works for Wal-Mart.

The dispute in this appeal concerns the nature and extent of claimant's work disability. Respondent does not argue for disability based on functional impairment. K.S.A. 1999 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

The Board finds claimant's wage loss, for purposes of calculating work disability, is 39 percent rather than the 43 percent used by the ALJ. The ALJ concluded claimant worked 40 hours per week for \$7.40 per hour at Wal-Mart, that was claimant's testimony at the regular hearing, but the parties later introduced documents showing claimant earned \$7.90 per hour. At the hearing before the Board in this appeal, claimant's counsel stipulated that claimant earns \$7.90 at Wal-Mart. The weekly wage at Wal-Mart is, therefore, \$316. Claimant's average weekly wage at the time of the accident was \$518.67. Claimant's wage loss is, therefore, 39 percent.

The Board agrees with the ALJ's decision to average the task loss opinion but it appears the ALJ made a calculation error. The Board finds claimant's task loss is 36 percent. This is an average of the 69 percent task loss opinion of Dr. Murati and the 3 percent task loss opinion of Dr. Eyster. The respondent has argued the Board should use only Dr. Eyster's opinion. Claimant has argued the Board should use only Dr. Murati's opinion. The Board agrees with the ALJ that both opinions are credible and should be given equal weight.

The Board finds claimant is entitled to a 38 percent work disability based on a 36 percent task loss and a 39 percent wage loss.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on November 12, 1999, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
E. L. Lee Kinch, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director